

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

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FALL RIVER SCHOOL COMMITTEE

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Case No. MUP-12-1508

and

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FALL RIVERS EDUCATORS  
ASSOCIATION/MTA/NEA

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Date Issued: February 28, 2014

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Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Bruce Assad, Esq.

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Representing the Fall River School Committee

Richard Mullane, Esq.

-

Representing the Fall River Educators  
Association/MTA/NEA

HEARING OFFICER'S DECISION

SUMMARY OF THE CASE

1       The issue in this case is whether the Fall River School Committee (Committee or  
2 Employer) engaged in regressive bargaining in violation of Sections 10(a)(5) and,  
3 derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law)  
4 by withdrawing a proposal that instructional make-up days be scheduled for five  
5 Saturdays during the 2011-2012 academic year, be held as half-days instead of full-  
6 days. I find that the Employer engaged in regressive bargaining when it withdrew a  
7 proposal to schedule instructional make-up days as half-days on five Saturdays during  
8 the 2011-2012 academic year, in violation of the Law.

STATEMENT OF THE CASE

The Fall River Educators Association (Association) filed a charge with the Department of Labor Relations (DLR) on January 23, 2012, alleging that the Committee had engaged in prohibited practices within the meaning of Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). A DLR Investigator conducted an investigation on May 2, 2012 and issued a Complaint of Prohibited Practice (Complaint) on June 15, 2012, alleging that the Employer failed to bargain in good faith with the Association by engaging in regressive bargaining over the Saturday make-up days in violation of the Law. The Committee filed its Answer to the Complaint on June 29, 2012.

I conducted a hearing on May 3, 2013, at which both parties had the opportunity to be heard, examine witnesses and introduce evidence. The Committee and the Association filed their post-hearing briefs on June 19 and 20, 2013, respectively. After reviewing the record evidence, which consists of stipulated facts, documentary exhibits and witness testimony, and after considering the parties' arguments, I make the following findings of fact and render the following decision.

STIPULATIONS OF FACT

1. The City of Fall River (City) is a public employer within the meaning of Section 1 of the Law.
2. The Committee is the City's collective bargaining representative for the purpose of dealing with employees of the Fall River Public Schools.
3. The Association is an employee organization within the meaning of Section 1 of the Law.

1 4. The Association is the exclusive bargaining representative for a  
2 bargaining unit of the Committee's instruction staff and certain other  
3 professional employees within the Fall River Public Schools.

4 5. At all relevant times, Meg Mayo-Brown (Mayo-Brown) was the  
5 Superintendent of the Fall River Public Schools and acted as an agent of  
6 the Committee.

7 6. At all relevant times, Paula Kaylor (Kaylor) was the President of the  
8 Association and acted as an agent of the Association.

9 7. At all relevant times, Elizabeth Coogan (Coogan) was the Principal of  
10 the Edmond P. Talbot Middle School (Talbot School).

11 8. The Committee closed the Talbot School for five days from Monday,  
12 September 19, 2011 through Friday, September 23, 2011, to test for the  
13 presence of polychlorinated biphenyls (PCBs).  
14

15 9. Subsequently, the Association and the Committee (together, the  
16 parties) agreed to meet to bargain over a make-up schedule for the lost  
17 instructional time at the Talbot School due to the closing during the week  
18 of September 18, 2011.  
19

20 10. Association President Kaylor and Superintendent Mayo-Brown  
21 exchanged e-mails on Wednesday, October 5, 2011, and Monday,  
22 October 10, 2011, respectively, on the subject of make-up days at the  
23 Talbot School.  
24

25 11. On Tuesday, October 11, 2011, the parties met to bargain and  
26 discussed scheduling make-up instructional time at the Talbot School  
27 during the school year. Present for the Committee were Superintendent  
28 Mayo-Brown and Bruce A. Assad (Assad), Esq. President Kaylor, MTA  
29 Consultant Philip Katz (Katz), and some bargaining unit members from the  
30 Talbot School attended for the Association.  
31

32 12. By letter dated October 31, 2011, and addressed to "Talbot  
33 Community Members," Talbot School Principal Coogan stated that, in  
34 order to make up for the days missed in September, the Talbot School  
35 would hold half-day make-up sessions on the following five Saturdays:  
36 November 19, 2011; January 7, 2012; February 4, 2012; May 5, 2012; and  
37 May 12, 2012. While the standard day at the Talbot School ran from 7:25  
38 a.m. to 2:10 p.m., Principal Coogan's letter indicated that the make-up  
39 days would start at the normal time of 7:25 a.m. but would end at 11:00  
40 a.m., and lunch would not be served.  
41

1 13. During the fall of 2011, Superintendent Mayo-Brown and President  
2 Kaylor, exchanged e-mails on the issue and addressed, *inter alia*, a make-  
3 up half-day scheduled for Saturday, November 19, 2011. The Committee  
4 canceled the make-up time scheduled for that date, however, due to the  
5 anticipated absence of a number of bargaining unit members, at least  
6 some of whom were going to be taking the MTEL test on that date.  
7

8 14. On Tuesday, December 6, 2011, the parties met for a second time to  
9 bargain on the make-up time at the Talbot School. No make-up time had  
10 occurred as of that date. Present for the Committee were Superintendent  
11 Mayo-Brown, Mr. Assad, Talbot Principal Coogan and Tom Coogan, Chief  
12 Operating Officer. President Kaylor, Mr. Katz, and a bargaining unit  
13 member from the Talbot School attended for the Association.  
14 Representatives of the Fall River Administrators Association (FRAA) and  
15 the Fall River Federation of Paraprofessionals (FRFP) also attended. At  
16 that bargaining session, the Committee states its position that all make-up  
17 days would be full school days.  
18

19 15. On Friday, December 16, 2011, the parties met for a third time to  
20 bargain on the make-up time at the Talbot School. No make-up time had  
21 occurred as of that date. Present for the Committee were Superintendent  
22 Mayo-Brown, Mr. Assad, Principal Coogan, and Mr. Coogan. President  
23 Kaylor, Mr. Katz and some bargaining unit members from the Talbot  
24 School attended for the Association. Representatives of the FRAA and  
25 the FRFP also attended. The Committee repeated its position that all  
26 make-up days would be full days.  
27

28 16. Thereafter, the Committee scheduled the make-up days at the Talbot  
29 School as full days on five Saturdays during the 2011-12 school year and  
30 those make-up days occurred as full days.  
31

32 17. Members of the Association's bargaining unit who worked at the  
33 Talbot School received their regular pay for the week that the school was  
34 closed in September of 2011. The members of the Association's  
35 bargaining unit who worked the five make-up days at the Talbot School  
36 during the 2011-12 school year received no additional compensation.  
37

#### 38 FINDINGS OF FACT

#### 39 The Two Parent Surveys and the First Bargaining Session

1           During the September 19-23, 2011 Talbot School shut down, the Committee  
2   granted unit members paid leave with the understanding that they would make-up those  
3   five days at some point in the school year. By e-mail on October 5, 2011, President  
4   Kaylor contacted Superintendent Mayo-Brown and requested to bargain over the five  
5   make-up days. By that e-mail, Kaylor also offered two scheduling options for the five  
6   make-up days: (1) a five-day, Saturday option or (2) a three-day, Saturday and two-day,  
7   Holiday option. Kaylor also stated that the Association expected the make-up “days not  
8   to be full days because that would make kids less likely to come to school, since a full  
9   day would create more conflicts.” Sometime after October 5, 2011, the Committee  
10   conducted a parent telephone survey to determine their preference for scheduling the  
11   five make-up days. The survey consisted of the two options proposed by the  
12   Association, including a third “none of the above” option. The survey did not specify  
13   whether the scheduling options would consist of half-days or full-days.

14           By reply e-mail on October 10, 2011, Mayo-Brown responded to Kaylor’s October  
15   5, 2011 e-mail and offered to meet with the Association at 4:30 p.m. on October 11,  
16   2011. By that e-mail, Mayo-Brown also notified Kaylor about the results of the parents’  
17   survey. Of 570 attempted telephone calls: 79 parents selected the five-day Saturday  
18   option; 45 parents wanted a three-day, Saturday and two-day, holiday option; 122  
19   parents supported neither option; and approximately 300 parents provided no response.

20           The parties held their first bargaining session on October 11, 2011. At that  
21   meeting Katz proposed that the Committee schedule five half-day, Saturday make-up

1 sessions. While Mayo-Brown stated the Committee's preference for full-day make up  
2 sessions, she agreed to first re-survey the parents and get a higher response rate  
3 before deciding on a final schedule. On October 14, 2011, Mayo-Brown provided the  
4 parents with a written survey, asking them to either choose between the two original  
5 options or provide a different suggestion. The priority return deadline for that survey  
6 was October 19, 2011 and the Committee tabulated the results on or about October 24,  
7 2011. Like the telephone survey, the written survey did not specify whether the  
8 scheduling options included half-day or full-day make-up sessions; however, the written  
9 results showed that a majority of parents preferred the five-day, Saturday option.

10 Sometime after the Talbot School shut down on September 23, 2011 but before  
11 October 31, 2011, Principal Coogan received inquiries from teachers and parents about  
12 when the Committee would reschedule the make-up days. At a faculty meeting in  
13 October of 2011,<sup>1</sup> certain teachers<sup>2</sup> informed Coogan that the parties had selected five  
14 Saturday make-up dates. Although Coogan did not attend the parties' October 11, 2011  
15 bargaining session, she issued a letter on October 31, 2011, informing members of the  
16 Talbot School community about the results of the parent survey<sup>3</sup> and notifying them that  
17 the Committee had selected the following five Saturdays as half-day, make-up sessions:

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<sup>1</sup> Coogan testified that the faculty meeting was different from the October 11, 2011 bargaining session; however, she failed to clarify the specific date of that faculty meeting.

<sup>2</sup> Coogan did not identify those teachers.

<sup>3</sup> Coogan did not clarify whether the survey results were from the telephone survey, the written survey or both.

1 November, 19, 2011; January 7, 2012; February 4, 2012; May 5, 2012; May 12, 2012.  
2 In that letter, Coogan also stated, in part, "Breakfast will be served. Lunch will **not** be  
3 served. The day will start at normal time 7:25 a.m. and will end at 11:00 a.m."  
4 (Emphasis in original.) After issuing that letter, Coogan continued to receive telephone  
5 calls from some parents who expressed their disliking of the half-day, Saturday make-up  
6 sessions because of personal scheduling conflicts with religious activities.

7 At some point after October 31, 2011, Mayo-Brown contacted Coogan to  
8 determine why she had sent the October 31, 2011 letter. Mayo-Brown did not rescind  
9 Coogan's October 31, 2011 letter and did not issue a correction letter. Instead, Mayo-  
10 Brown asked Coogan to attend all future bargaining sessions with the Association over  
11 the issue of make-up days.

#### 12 **The November 19, 2011 Half-Day, Make-Up Session**

13 Sometime between October 31, 2011 and November 7, 2011, Mayo Brown and  
14 Kaylor continued to discuss the make-up day schedule. By e-mail on November 8,  
15 2011, Mayo-Brown memorialized those discussions, stating in full:

16 This is a follow up to the telephone conversation you and I had yesterday  
17 regarding the Talbot make-up days.

18  
19 I want to recap the process used to determine the make-up dates:

20  
21 When we held the Talbot faculty meeting on September 19 in the Kuss  
22 Community Room to provide an update on the status of the school's  
23 closure, we agreed that the Talbot school community should determine  
24 the make-up dates. To that end, you announced that teachers who  
25 wanted to serve on a committee should give their names to Leslie Gula. I  
26 was supportive of that idea because I felt that the Talbot teachers would  
27 be in one of the best positions to determine how the days could be made

1 up in a way that preserved teaching and learning to the largest extend  
2 possible.

3  
4 I know you took the time to meet with both the Talbot Teacher Committee  
5 and the Talbot faculty-at-large. The dates you provided in your October 5,  
6 email were used to conduct a parent phone survey to determine which of  
7 the two options were better for families. During our impact bargaining  
8 session on October 11 we shared the low response rate of the phone  
9 survey and agreed that providing the third option of "none of the above"  
10 probably created confusion. The FREIA recommended we conduct a  
11 follow-up written survey, with a space for parents to "write in" an option  
12 outside of the options provided. We created the survey, the school sent  
13 the survey home and the response, while still low, was in strong support of  
14 the 5 Saturday option.

15  
16 Last week, you and I spoke on the phone and I shared the parents' choice  
17 of the 5 Saturday option. We talked about beginning with the November  
18 19 date and using the two dates in May, but providing notice to parents,  
19 that depending upon weather, we may move one of those May dates to a  
20 late June date. During that same conversation I shared that given the  
21 date of the November 14 School Committee being just 4 days notification  
22 to parents, I would proceed by asking School Committee members for  
23 their support of notifying parents by November 4 [sic] so that parents  
24 would have time to make arrangements. Members agreed to the early  
25 notification and will formally vote on the dates at the November 14 School  
26 Committee meeting.

27  
28 At this juncture, based on surveys, our conversations and emails, the  
29 October 11 impact bargaining session, and School Committee support, all  
30 600 Talbot students and their families have been notified of the November  
31 19 date. Beginning yesterday, I was informed that 8 teachers are stating  
32 they are unavailable on November 19 due to state MTEs (I've been  
33 copying you on those emails as I receive them). Additionally, 3 more  
34 teachers have requested personal days.

35  
36 I know you and I share a commitment to ensuring the Talbot students  
37 receive a high quality educational experience on their make-up days. It is  
38 unfortunate that 11 teachers are now indicating they are not available on  
39 November 19. I feel the number of teachers stating their unavailability  
40 does indeed comprise the teaching and learning that is necessary on  
41 November 19. You asked about the possibility of substitute teachers on  
42 November 19. While we will make every effort to recruit subs for



1 November 19, the learning experience will not be the same for the  
2 children.

3  
4 Both you and I have been trying to find mutual dates to meet to continue  
5 the discussion with the association. Today at 4:00 p.m. is still open for  
6 Bruce and me, however I understand that doesn't work on your end.  
7 Please provide a few dates for next week and I will check with Bruce. We  
8 need [to] proceed on November 19 as a scheduled make-up day, as we  
9 have notified all students and families of the date. I am inclined to require  
10 to teachers to use personal time for requested time off on November 19,  
11 regardless of circumstance. It seems to me you did everything you could  
12 to give teachers a voice in determining the dates and no one spoke up  
13 (with the exception of one or two who you had mentioned to me).  
14 However, I will wait until we meet before making any determinations about  
15 use of personal time.

16  
17 Meanwhile, I hope you will continue to express to teachers the importance  
18 of the Saturday sessions and I also hope we will have no further requests  
19 for scheduled absence on November 19.

20  
21 By e-mail on November 9, 2011, Kaylor replied to Mayo-Brown's November 8,

22 2011 e-mail, stating, in full:

23 First, I feel that you are blaming the FREA for the slow progress in dealing  
24 with this issue. Perhaps I'm wrong, but I must correct the record. The  
25 FREA did not suggest that the district do a follow-up written survey with  
26 parents. At that bargaining session, we were ready to firm up the dates,  
27 but you felt the need to go to the parents again. It was then that we  
28 brainstormed ideas for effective surveying of parents (in writing, multiple  
29 languages, etc.). Also, I must point out that Bruce's schedule is what has  
30 been holding us up from meeting more than anything else, especially his  
31 need to cancel a key meeting on October 24.

32  
33 While the FREA is confirming November 19, we maintain our position that  
34 confirmation at this late juncture is a mistake, both educationally and with  
35 respect to our bargaining process. But it appears from your e-mail that  
36 you have no flexibility in this regard. I realize having that many teachers  
37 out on November 19 is not good, and especially not good for the first  
38 make-up day. I am also perplexed at the number of teachers who cannot  
39 teach that day, however it seemed to never be clear that the date was  
40 confirmed until very recently and given that the October dates came and

1 went, there may have been an expectation that the Nov 19 date may meet  
2 the same fate.

3  
4 So, the FREA expects the following for November 19 only:

5  
6 1. A shortened school day will take place on November 19: 7:25 a.m. to  
7 11:00 a.m.

8  
9 2. All teachers who work at Talbot full-time will be expected to go to work  
10 that day, only during the school day plus 5 minutes at each end.

11  
12 3. All teachers who can show they took an MTEL test will be excused  
13 without loss of pay or use of a benefit day.

14  
15 4. The other teachers shall be required to take a personal day to be  
16 excused; if the teacher does not have a day (or expects to use one later  
17 and will have run out by then), they are to ["borrow"] one from next year.  
18 Alternately, they could take a sick day.

19  
20 5. The teachers will be involved in helping determine the schedule and  
21 curriculum for the [day's] work.

22  
23 6. We will meet as soon as possible to finalize this and change any of  
24 these rules for future days. Our team is available on the following  
25 afternoons at 4:00 unless stated otherwise: Nov 22 (at 4:45), Dec 1, Dec  
26 2, Dec 6, Dec 9, Dec 12, Dec 13, Dec 15.

27  
28 On November 13, 2011, Mayo-Brown replied to Kaylor's November 9, 2011 e-  
29 mail, stating, in full:

30 I am slow to respond to your email as I have been ill, but wanted to get  
31 back to you regarding the points you raise.

32  
33 First, I am not blaming the FREA for the slow progress with this issue.  
34 There is plenty of time left to make up the days and I want to be sure the  
35 make up days are productive days for teaching and learning. That said, I  
36 am frustrated the FREA provided November 19 as a make up day when 8  
37 members of the [A]ssociation are not able to provide instruction that day  
38 due to their scheduled participation in the teacher test.  
39

1 Second, there is a misinterpretation of my statement regarding the follow  
2 up survey. I was not suggesting the FREA asked us to conduct a follow  
3 up survey, my statement about FREA was with regard to the suggestion of  
4 a write in option.  
5

6 Third, the meeting on October 24 was postponed to allow for surveys to  
7 be tabulated. I received call from parents indicating their children did not  
8 bring home the survey until the day before the due date of October 19. I  
9 assured parents that we wanted their input and would allow for extra time  
10 to return the surveys. The postponement of October 24 does not change  
11 the fact that the 8 members are not available on November 19.  
12

13 Fourth, if you feel November 19 is not good educationally, why did the  
14 FREA propose the date? We moved ahead with the date based on our  
15 conversations, emails, and impact bargaining session on October 11.  
16

17 Here are my expectations for November 19:  
18

- 19 • School will be in session from 7:30 – 11:30. Students deserve a full  
20 day of instruction, however I understand [the Association] wants to  
21 reduce the amount of time in hopes of increasing student  
22 participation.
- 23 • The contract will be followed in terms of teacher work day –  
24 teachers will report 10 minutes prior to the start of the day and  
25 remain 5 minutes after.
- 26 • Teachers who participate in MTEL will be considered on a  
27 professional business day – no loss of benefit.
- 28 • I cannot agree to item #4.
- 29 • Teachers will continue with their unit lessons, there is no need to  
30 determine the curriculum.  
31

32 Thank you for providing additional meeting dates. I will speak with Bruce  
33 to determine mutual dates.  
34

35 On November 14, 2011, the Committee held an executive session and discussed  
36 the issue of make-up days. At that meeting, Mayo-Brown, Assad and other Committee  
37 members expressed their preference for full make-up days over half-days but did not  
38 vote on the issue, deferring to Mayo-Brown's bargaining authority with the Association

1 to resolve the matter. Principal Coogan did not attend the executive session.  
2 Sometime between November 14, 2011 and November 19, 2011, the Committee and  
3 the Association agreed to cancel the November 19, 2011 make-up date, due to the  
4 large number of teacher unavailability.

5 **The December Bargaining Sessions**  
6

7 The parties held their second bargaining session on December 6, 2011, and  
8 continued negotiations over how to schedule the make-up days. At that meeting, the  
9 Association maintained its position that it wanted all make-up days to be scheduled as  
10 half-days. However, the Committee stated for the first time and without explanation that  
11 it would only schedule full-day, make-up sessions. In response, the Association  
12 proposed that the Committee pay unit members double compensation for working full  
13 make-up days. The Committee rejected that proposal, maintaining that it would only  
14 give unit members "straight pay" (i.e., no further compensation over the money already  
15 paid). The Association made another offer, proposing 1.9 normal pay (i.e., "1" for the  
16 amount already paid and ".9" for additional pay) but the Committee declined that offer  
17 and reiterated its position for straight pay, only. The parties ended that bargaining  
18 session without resolving the issue but agreed to meet again on December 16, 2011.

19 At their last bargaining session on December 16, 2011, the Association again  
20 demanded five half-day make-up days or, in the alternative five full-day, make up days  
21 with double compensation. Again, the Committee rejected the Association's offers, and  
22 demanded five full-day make-up sessions without additional compensation. At that

1 point, the Association declared impasse. The Committee scheduled five full-day,  
2 Saturday make-up sessions on: January 7, 2012; February 4, 2012; May 5, 2012; June  
3 6, 2012; and June 20, 2012. Unit members worked those five make-up days without  
4 additional compensation.

### 5 OPINION

6 Section 6 of the Law obligates a public employer to “negotiate in good faith with  
7 respect to wages, hours, standards of productivity and performance and many other  
8 terms and conditions of employment” with the exclusive bargaining representative of its  
9 employees. Failure to do so is a prohibited practice under Section 10(a)(5) of the Law.  
10 The parties’ conduct must always be calculated to move the negotiations forward  
11 toward agreement. Springfield School Committee, 24 MLC 7 (1997). Conduct that is  
12 designed, or can be reasonably expected to move the negotiations backward is  
13 regressive and constitutes a refusal to bargain. Framingham School Committee, 4 MLC  
14 1908, 1813 (1978). The test of a party’s good faith in negotiations involves an  
15 examination of the totality of conduct. City of Springfield, 7 MLC 1832, 1834 (1981).

16 While the Commonwealth Employment Relations Board (Board) has held that a  
17 party engages in regressive bargaining in violation of its duty to bargain in good faith by  
18 withdrawing proposals from bargaining, it also recognizes that a party does not  
19 necessarily engage in regressive bargaining when that withdrawal results from changed  
20 circumstances that have arisen during the course of negotiations. City of Quincy, 6  
21 MLC 2144 (1980); see also Wood Hole, Martha’s Vineyard, and Nantucket Steamship

1 Authority, 14 MLC 1518, 1539 (1988). To succeed on this claim however, an employer  
2 must demonstrate that it faced a fiscal emergency sufficient to excuse a withdrawal of  
3 earlier economic offers. Springfield School Committee, 24 MLC at 8. Where the  
4 changed circumstances have an actual impact on an employer's ability to pay or on  
5 other existing proposals, and there is no other evidence that the employer's actions  
6 were motivated by a desire to stymie negotiations, no regressive bargaining will be  
7 found. Id.

8       The issue in this case is whether the Committee engaged in regressive  
9 bargaining when it decided in December of 2011 that all make-up days would be  
10 scheduled as full days. The Association contends that at the October 11, 2011  
11 negotiation, the Committee agreed to schedule all make-up sessions as half-days, and  
12 that Coogan's October 31, 2011 letter shows that the Committee proposed to scheduled  
13 only half-day, make-up sessions. It also maintains that Kaylor's November 9, 2011 e-  
14 mail stated the Association's expectations for the November 19, 2011 make-up date,  
15 only, and that the parties would clarify all other issues for the remaining four make-up  
16 days at the next bargaining session. The Association argues that the Committee  
17 engaged in regressive bargaining at the December 6 and 16, 2011 bargaining sessions  
18 by: withdrawing the October 31, 2011 proposal to schedule all make-up sessions as  
19 half-days; proposing that all five make-up sessions be scheduled as full-days; and  
20 rejecting the Associations' counter-proposals for additional compensation.

1       The Employer argues that it did not engage in regressive bargaining because the  
2 Association agreed in its November 9, 2011 e-mail that “only” one half-day make up  
3 session would occur on November 19, 2011, but because the parties canceled that  
4 make-up session due to MTEL testing, there can be no violation. The Committee also  
5 contends that the Association agreed to bargain over whether the four remaining four  
6 make-up day sessions would be half days or full days at the December 6 and 16, 2011  
7 negotiations. Further, the Committee maintains that its decision at those negotiations to  
8 schedule all five make-up sessions as full days did not amount to regressive bargaining  
9 because the Union unilaterally declared impasse at the December 16, 2011 bargaining  
10 session, making it impossible for the parties to negotiate further over the issue.

### 11   **The Employer’s Proposals**

12       Although the Committee first mentioned its preference for a full-day, make-up  
13 schedule at the parties’ October 11, 2011 bargaining session, it deferred to the results  
14 of the parent surveys before making a proposal deciding on half-days or full-days. The  
15 parent surveys were silent about whether the Committee should schedule the make-up  
16 sessions as full-days or half-days. When the Committee finally tabulated the survey  
17 results on or about October 29, 2011, Coogan issued her letter two days later notifying  
18 Talbot School community members that the Committee was implementing a half-day,  
19 five-day make-up schedule. The Committee did not rescind Coogan’s October 31, 2011  
20 letter and did not issue a new letter correcting Coogan’s five half-day, make-up day

1 announcement. That non-action supports the Association's argument that the  
2 Committee initially proposed scheduling all five make-up days as half-day sessions.

3 Through their e-mail exchanges on November 8, 9 and 13, 2011, the parties  
4 agreed to specific terms for the November 19, 2011 make-up date only, and then  
5 agreed to reschedule the four remaining make-up days at the parties' next bargaining  
6 sessions. Although Mayo-Brown stated her preference for a full-day make-up schedule  
7 at the Committee's executive session—which was conducted a few hours prior to the  
8 November 14, 2011 School Committee meeting—the Association was not present at  
9 that executive session meeting and, thus, knew nothing about the Committee's new  
10 bargaining position of wanting all make-up days to be scheduled as full days. Rather,  
11 the Committee informed Mayo-Brown during the executive session that it was deferring  
12 to her bargaining authority with the Association to resolve the issue.

13 After the November 14, 2011 executive session, Mayo-Brown and President  
14 Kaylor continued to discuss the November 19, 2011 make-up date and ultimately  
15 agreed to cancel that date due to MTEL testing. However, at no point between those  
16 November discussions and the parties' second bargaining session on December 6,  
17 2011, did the Committee ever notify the Association of its changed position to schedule  
18 all five make-up sessions as full-days. Instead, the Association first learned of the  
19 Committee's changed proposal on December 6, 2011, and offered two counter-  
20 proposals for additional compensation in exchanged for a full-day make-up schedule.  
21 However, the Committee rejected the Association's counter-proposals and maintained



1 its position through the final bargaining session on December 16, 2011, when the  
2 Association finally declared impasse.

3 Besides the MTEL test scheduled for November 19, 2011, the Committee failed  
4 to produce any events arising during parties' three bargaining sessions that permitted  
5 the Committee to lawfully change its negotiating posture.<sup>4</sup> Contrast Wood's Hole, 14  
6 MLC at 1539 (four events – denial of an interest arbitration request; issuance of an  
7 arbitration award that could potentially increase labor costs; a proposal to exclude a  
8 vessel from the provisions of the collective bargaining agreement; and hiring hall referral  
9 problems – that occurred during the parties' negotiations prompted the employer to  
10 demand new concessions from the union. The Board found no regressive bargaining  
11 because due the changed circumstances that arose during negotiations, the employer  
12 lawfully offered new concessionary proposals). Based on the record, I find that the  
13 Committee failed to demonstrate that it faced any changed circumstances sufficient to  
14 excuse the withdrawal of its proposal to schedule all five make-up days as half-days.  
15 Springfield School Committee, 24 MLC at 8.

### 16 **Frustrated negotiations**

17 Next, I consider whether the evidence demonstrates that the Committee  
18 withdrew its proposal to schedule all five make-up sessions as half-days to frustrate the  
19 parties' bargaining process.

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<sup>4</sup> There is no evidence in the record pointing to the MTEL test as a changed circumstance; and, moreover, the Committee does not argue that the MTEL test created a changed circumstance.

1           The Committee argues that it announced its preference for full-day make-up  
2 sessions at the October 11, 2011 negotiation and reiterated that preference at the  
3 November 14, 2011 School Committee meeting and executive session. While the  
4 Committee admits that it agreed to schedule the first make-up day as a half-day on  
5 November 19, 2011, it argues that it never agreed to schedule all five make-up days as  
6 half-days and that the parties would bargain over the four remaining make-up days at  
7 the next bargaining sessions. It also asserts that the Association frustrated the  
8 bargaining process by unilaterally declaring impasse on December 16, 2011, which  
9 effectively terminated the Committee's opportunity to engage in further bargaining.

10           I disagree with the Association's contention that the Committee proposed to  
11 schedule all make-up days as half-day sessions at the parties' first bargaining session  
12 on October 11, 2011 because the evidence shows that the both parties agreed to wait  
13 for the results of the parent surveys before deciding the issue of full-day versus half-day  
14 make-up sessions. However, I am not persuaded by the Employer's arguments. First,  
15 it offers no case law to support its action of withdrawing the October 31, 2011 proposal  
16 to schedule all five make-up sessions as half-day sessions. Next, the Association's  
17 declaration of impasse on December 16, 2011 could not have affected the Committee's  
18 Section 6 duty to bargain in good faith on December 6, 2011 when it first withdrew the  
19 half-day proposal. The Employer imposed new, predictably unacceptable demands on  
20 the Association at the final two bargaining sessions that destroyed the premise on which  
21 all prior bargaining had been premised; ultimately, terminating the bargaining process

1 and any hopes of settlement by the parties. See Watertown School Committee, 9 MLC  
2 1301, 1304 (1982); see also Framingham School Committee, 4 MLC at 1813 (Board  
3 inferred bad faith against employer because proposal was "predictably unacceptable" or  
4 so "patently unreasonable as to frustrate agreement"). The withdrawal of the October  
5 31, 2011 proposal was calculated to move the parties' negotiations backwards from  
6 having all half-day make-up sessions to scheduling only full-day make-up sessions.  
7 City of Springfield, 7 MLC at 1834.

#### 8 **Totality of the Circumstances**

9 The Board tests a party's good faith in negotiations by examining the totality of  
10 the conduct exhibited at the bargaining table and the nature of the bargaining rather  
11 than isolated deeds or the merits of the parties' proposals. City of Springfield, 7 MLC at  
12 1834; Springfield School Committee, 24 MLC at 8. Here, the totality of the parties'  
13 conduct persuades me that the Committee failed to comply with its good faith  
14 bargaining obligations. Instead of moving the parties' negotiations forward from its  
15 proposal to schedule five half-day make-up sessions, it insisted at the parties'  
16 December 2011 bargaining sessions on scheduling all make-up days as full-days, thus  
17 moving the parties' negotiations backwards. Watertown School Committee, 9 MLC at  
18 1304.

#### 19 **REMEDY**

20 The traditional remedy for a regressive bargaining violation is a bargaining order  
21 coupled with an order to cease and desist from introducing further regressive demands.

1 Watertown School Committee, 9 MLC at 1305-06; Ex-Cell-O Corp., 185 NLRB 107 enf'd  
2 449 F.2d 1058 (D.C. Cir. 1971). There are, however, instances where such orders do  
3 not attain the status quo ante and are therefore inadequate. Where the respondent's  
4 conduct substantially impairs bargaining between the parties, the Board will grant  
5 extraordinary relief to remedy the full consequences of the violation. Framingham  
6 School Committee, 4 MLC at 1814; Middlesex County Commissioners, 3 MLC 1594  
7 (1977).

8       The Association argues that the present case requires an extraordinary remedy  
9 and requests monetary damages for each unit member affected by the Committee's  
10 unlawful conduct. Specifically, it requests that the Committee pay each unit member  
11 who worked one or more of the five days .5 days of pay per day actually worked. I  
12 disagree. The Committee closed the Talbot School during the week of September 19-  
13 23, 2011, and offered unit members paid-leave for those five days. The Association  
14 accepted the Committee's offer, and the Committee paid the bargaining unit members  
15 for five, full-days of work, with the understanding that the unit members would make up  
16 those unworked days at some point during the 2011-2012 academic year—which they  
17 did during the months of January through June of 2012. Thus, an award to return to the  
18 status quo ante in this case would not include paying unit members additional  
19 compensation. Rather, I order the Committee restore its offer to schedule five half-day  
20 make up sessions and to bargain in good faith over that issue on demand by the Union.

21                                   CONCLUSION

ORDER

1. Cease and desist from:

- SO ORDERED.

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COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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KENDRAH DAVIS, ESQ. HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Division of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



# **NOTICE TO EMPLOYEES**

## **POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS**

**AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Fall River School Committee (Committee) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E when it regressively bargained with the Fall Rivers Educators Association (Association) by unlawfully withdrawing a proposal to schedule make-up days as half-days rather than full-days.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Committee assures its employees that:

WE WILL NOT fail or refuse to bargain in good faith with the Association by engaging in regressive bargaining.

WE WILL bargain in good faith with the Association to resolution or impasse over the decision to schedule make-up sessions.

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For the Committee

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Date

### **THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).